

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

International Brotherhood of)	
Electrical Workers, Local 538,)	
)	
Union/Charging Party,)	
)	Case Numbers 25-CA-249830
)	25-CA-251056
and)	25-CA-251084
)	25-CA-252037
)	25-CA-253355
Full Fill Industries LLC,)	25-CA-256552
)	
Employer.)	

EMPLOYER’S MOTION TO DISMISS
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Now comes Full Fill Industries LLC (“Full Fill” or “Respondent”), the named Employer in the above-referenced matters, by and through its Attorney, David B. Wesner, of Evans, Froehlich, Beth and Chamley, and for its Motion to Dismiss Consolidated Complaint and Notice of Hearing (“Consolidated Complaint”) involving the above-referenced unfair labor practice charges states as follows:

On August 26, 2020, an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing was entered. Such Consolidated Complaint included additional allegations as well as additional charges.

On September 1, 2020, Full Fill filed its Answer to such Consolidated Complaint.

Section 102.15 of the Board’s Rules requires a complaint contain a clear and concise description of the acts which are claimed to constitute unfair labor practices. The Consolidated

Complaint falls short of this requirement. The Consolidated Complaint only provides conclusory statements with no specific factual allegations providing a clear description of acts which would support a conclusion that a violation or violations of the Act were committed. For these reasons and the reasons set forth below, the Consolidated Complaint and each charge incorporated therein should be DISMISSED, or in the alternative a more definite consolidated complaint should be filed providing specific factual allegations in order to allow Respondent to properly defend the consolidated complaint and associated charges.

I. Charge 25-CA-249830

The allegations with respect to this Charge are two-fold: surveillance; and, the termination of an employee.

A. Surveillance. With regard to surveillance, the consolidated complaint only contains conclusory statements. The complaint does not contain a clear description of the acts alleged to be in violation of the Act. The two alleged occurrences involve Brian Clapp and Rock Delp. The occurrence involving Brian Clapp is alleged to have occurred on a single day where he “engaged in surveillance” and “by taking his phone out while observing employees engaged in Union activities, created an impression among its employees that their Union activities were under surveillance”. The occurrence involving Rock Delp is alleged to have occurred on a single day where “by making statements to employees, (he) created an impression among its employees that their union activities were under surveillance”.

Not every occurrence of the employer viewing employees can be considered surveillance in violation of the Act. The allegations concerning Brian Clapp clearly indicate that it was an isolated occurrence. The allegations merely indicate that he had taken his phone out while within view of employees. The allegations do not indicate any further occurrences. The consolidated complaint does not provide any facts as to the location of the occurrence or which employees were present to support the allegation they were union employees. The consolidated complaint does not provide any facts concerning the activity the employees were involved in to support the suggestion they were involved in union activity. The consolidated complaint does not contain any facts concerning how Mr. Clapp was “observing” the employees. The consolidated complaint does not contain any factual allegations to indicate that he was taking

photographs or videos of employees. In its best light, the complaint only suggests an isolated occurrence of Mr. Clapp being visible to employees with a phone in his hand.

As found by the Board, a random or isolated viewing of a union gathering is not prohibited surveillance. *Hoyt Water Heater Co.*, 282 NLRB 1348 (1987). At best, the circumstances involving Brian Clapp would amount to an isolated viewing of employees. Pursuant to *Hoyt*, such circumstances are not prohibited surveillance. Any alleged surveillance in violation of the Act must lead reasonable employees to assume that their union activities have been placed under surveillance. *Durham School Services*, 361 NLRB 1197 (1993). A single occurrence of the employer observing employees ostensibly in a union gathering or engaging in protected activity cannot rise to the level that reasonable individuals would assume that they are under surveillance. Additionally, any suggested surveillance in violation of the Act must be coercive in its nature. The factors to be considered are: the duration of the observation, the distance from the employees, and whether any coercive behavior was exhibited. *Aladdin Gaming LLC*, 345 NLRB 585 (2005). No factual allegations are contained in the consolidated complaint and no facts can be adduced at any hearing which would lead to a conclusion that the occurrence involving Brian Clapp was a violation of the Act. As such, the consolidated complaint and associated charge involving Brian Clapp should be DISMISSED.

The allegations involving Rock Delp center on statements he allegedly made. The consolidated complaint clearly indicates that this was a single occurrence. The consolidated complaint does not contain any facts describing the alleged statements. In order to be considered a violation, statements must, under all relevant circumstances, lead reasonable employees to assume that their union activities have been placed under surveillance. *Durham School Services*, 361 NLRB 1197 (1993). In United Food and Commercial Workers Union Local 204 v. National Labor Relations Board, 506 F.3d 1078 (DC Cir. 2007), the court held that in order to assess the legality of an employer's surveillance activity, the appropriate question is whether there was proper justification and whether it reasonably tends to coerce employees. *Id.* at 1085. Additionally, any presumption of a violation may be rebutted by legitimate security objectives or risk posed by the activity of the employees or union. *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB 16 (2020). No factual allegations are contained in the consolidated complaint and no facts could be adduced at a hearing which would lead to a conclusion that the occurrence involving Rock Delp was a violation of the Act. As such, the consolidated complaint

and associated charge involving Rock Delp should be DISMISSED, or in the alternative a more definite consolidated complaint should be filed setting out with particularity the factual allegations concerning the occurrence involving Rock Delp to allow Respondent to properly defend the allegations.

B. Termination of Rick Johnson

No factual allegations are contained in the consolidated complaint concerning the termination of Rick Johnson. The consolidated complaint merely makes conclusory statements that Mr. Johnson was terminated and that such termination was based upon his involvement with the union.

Complaints which allege an employee's discipline or discharge was based solely upon the employee's involvement with the Union will be reviewed under the framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). Under *Wright Line*, the General Counsel has the initial burden of establishing that the employee's union activity was the motivating factor in the discipline or discharge. The General Counsel's burden requires establishing: the employee is engaging in union activity; the employer's knowledge of that activity; and, the employer's anti-union animus. Further, any evidence propounded must establish a causal connection between the employee's protected activity and the discipline or discharge. The consolidated complaint does not contain any factual allegations to support the charge. The consolidated complaint does not contain any factual allegations that Mr. Johnson was engaging in union activity. The consolidated complaint does not contain any factual allegations that Full Fill knew of such activity. The consolidated complaint does not contain any factual allegations that indicate Full Fill has an anti-union animus. The consolidated complaint does not contain any facts to support a determination of a causal connection between Mr. Johnson engaging in union activity and his termination, nor can any be adduced at a hearing. As such, the Consolidated Complaint as it pertains to the charge involving Rick Johnson should be DISMISSED, or at a minimum a more definite consolidated complaint should be filed setting out with particularity the factual allegations regarding the termination of Rick Johnson to allow Respondent to properly defend such allegations.

II. Charge 25-CA-251056

The allegations with respect to this charge involve two items: threatening to search lockers; and, the search of an employee's tool box. The consolidated complaint only sets forth conclusory statements concerning this Charge. The consolidated complaint does not contain any factual allegations to support the charges.

Paragraph 2(a) of the Consolidated Complaint alleges that Respondent has been engaged in the manufacture and non-retail sale of aerosol and pump cooking sprays and oils. Said paragraph acknowledges that Full Fill is held to be within the food product industry. As such, Full Fill's operation is governed by federal rules and regulations not the least of which is the U.S. Food and Drug Administration's requirements pursuant to the Food, Drug and Cosmetic Act. These similar standards were addressed in *Cott Beverages Inc.*, 369 NLRB 82 (2020). As noted in *Cott*, the Food, Drug and Cosmetic Act requires manufacturers to evaluate hazards that could affect the product produced and held at its facility and institute preventative controls to significantly minimize or prevent the occurrence of such hazards. The question involved is whether the impact of policies instituted pursuant to federal requirements on employees' union activities is outweighed by the employer's business justification for the policies.

Although the conclusory statements contained in the consolidated complaint are based upon the exercise by the Respondent of its policies, the nature of the issue is unchanged. Full Fill has a policy in place regarding searches of lockers and toolboxes. Full Fill maintains a workplace search policy which serves multiple purposes, including regarding its requirements under Good Manufacturing Practices and Safe Food Quality Standards. The exercise of this policy is a reasonable effort to ensure the integrity of the Respondent's production process, satisfy FDA requirements regarding the safety and security of the products it produces, as well as ensure compliance with its drug and alcohol policy. Full Fill's significant and legitimate business interest in maintaining its workplace search policy and utilizing it outweighs the slight risk that it will interfere with an employee's right to engage in activity protected by the Act. As such, the consolidated complaint with respect to this charge should be DISMISSED.

III. Charge 25-CA-251084

This charge is centered on a single occurrence alleging that an individual “destroyed union literature in the presence of employees.” The consolidated complaint contains only a conclusory statement. The consolidated complaint contains no factual allegations to support the charge. The consolidated complaint does not contain any facts as to the exact location at the facility where the alleged incident occurred, the exact nature of the literature to support that it was “union literature”, or which employees were present to witness the alleged incident. As such, the consolidated complaint concerning this charge should be DISMISSED, or in the alternative a more definite consolidated complaint should be filed setting out with particularity the factual allegations concerning this charge to allow Respondent to properly defend the allegations.

IV. Charge 25-CA-252037 and Charge 25-CA-253355

The allegations involved in each of these charges relate to the same employee, Justin Kindle. The allegations suggest that Justin Kindle was disciplined and then discharged solely because he was involved with the union.

No factual allegations are contained in the consolidated complaint concerning the discipline and termination of Justin Kindle. The consolidated complaint merely makes conclusory statements that Mr. Kindle was disciplined and terminated and that such discipline and termination were based upon his involvement with the union.

Complaints which allege an employee’s discipline or discharge was based solely upon the employee’s involvement with the Union will be reviewed under the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Under *Wright Line*, the General Counsel has the initial burden of establishing that the employee’s union activity was the motivating factor in the discipline or discharge. The General Counsel’s burden requires establishing: the employee is engaging in union activity; the employer’s knowledge of that activity; and, the employer’s anti-union animus. Further, any evidence propounded must establish a causal connection between the employee’s protected activity and the discipline or discharge. The consolidated complaint does not contain any factual allegations to support the charges. The consolidated complaint does not contain any factual allegations that Mr. Kindle

was engaging in any union activity. The consolidated complaint does not contain any factual allegations that Full Fill knew of such activity. The consolidated complaint does not contain any factual allegations that Full Fill has anti-union animus. The consolidated complaint does not contain any facts to support a determination of a causal connection between Mr. Kindle's engaging in protected activity and his discipline and termination, nor can any be adduced at a hearing. As such, the Consolidated Complaint as it pertains to the charges involving Justin Kindle should be DISMISSED, or at a minimum a more definite consolidated complaint should be filed setting out with particularity the factual allegations regarding the discipline and termination of Justin Kindle to allow Respondent to properly defend such charges.

V. Charge 25-CA-256552

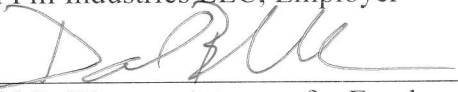
This charge involves an allegation that an employee was denied a request for union representation with regard to an interview that such employee reasonably believed would result in disciplinary action. The nature of the charge and allegations impacts what is commonly known as Weingarten rights.

In National Labor Relations Board v. Weingarten, 420 U.S. 251, 95 S. Ct. 959 (1975), the United States Supreme Court affirmed a Board decision concerning a right found to exist within Section 7 of the Act. The right determined to exist under Section 7 of the Act was an employee's right to request the presence of a union representative at an interview the employee reasonably believes will likely result in discipline. The circumstances under which Weingarten may apply involves the following: an interview of an employee by the employer; the employee must reasonably believe the interview will involve the imposition of discipline; the employee requests the presence of a union representative; the employer denies the request; and, the employer compels the employee to participate in the interview. The consolidated complaint fails to sufficiently plead factual allegations to support a charge of a violation of the Act with respect to Weingarten rights. The consolidated complaint fails to allege any facts to support that the employee had a reasonable belief that discipline would be imposed as a result of the interview. The consolidated complaint fails to allege any facts that the employee requested a union representative. In fact, the consolidated complaint fails to acknowledge that the employee

refused to request any union representative. The consolidated complaint contains a false allegation when it states that the employer refused the employee's request for union representation. The consolidated complaint fails to acknowledge that the employee refused to request a union representative and refused to provide any information concerning union representation to Full Fill. The consolidated complaint fails to allege any facts that the employer compelled the employee to participate in the investigatory interview. Inherent in the right to request a union representative is the right of the employee to refuse to participate in such an interview. The consolidated complaint fails to acknowledge that the employee voluntarily participated in the interview. Based upon the foregoing, the consolidated complaint fails to sufficiently allege a violation of the Act with regard to Weingarten rights. As such, the consolidated complaint and associated charge should be DISMISSED.

Full Fill respectfully requests that the Consolidated Complaint be DISMISSED.

Respectfully Submitted
Full Fill Industries LLC, Employer

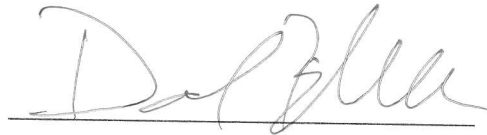
By: 
David B. Wesner, Attorney for Employer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22 day of September, 2020, he served a copy of the within Motion to Dismiss on:

Joe DiMichele, Lead Organizer
International Brotherhood of Electrical Workers, Local 538
1290 N. Michigan Ave.
Danville, IL 61832

by causing a copy of the same to be enclosed in an envelope clearly addressed as stated on the within and by causing said envelope to be deposited in a United States Post Office Mail Box in Danville, Illinois, with postage duly prepaid.

A handwritten signature in dark ink, appearing to read "D. Wesner", is written over a horizontal line.

David B. Wesner

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